

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



ORIGINAL

76-1087

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PFS

To be argued by  
GILBERT ROSENTHAL

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**United States Court of Appeals  
For the Second Circuit**

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UNITED STATES OF AMERICA,

*Appellee,*

-against-

ALBERT YOUNG,

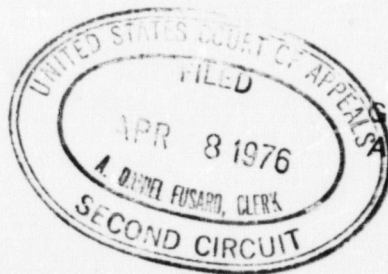
*Defendant-Appellant*

*On Appeal from Judgment of the United States District  
Court for the Southern District of New York*

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**BRIEF ON BEHALF OF  
DEFENDANT-APPELLANT ALBERG YOUNG**

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
UNITED STATES OF AMERICA, :  
 :  
 Appellee, :  
 : Docket No.: 76-1087  
 -against- : (1093)  
 :  
 ALBERT YOUNG, :  
 :  
 Defendant-Appellant. :  
-----X

STATEMENT PURSUANT TO RULE 28(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered February 11, 1976 in the United States District Court for the Southern District of New York (Brieant, J.) convicting Appellant Young after trial of 21 counts of bribery (Title 18 U.S.C. Sections 201(B) and 2) and sentencing him to 18 months imprisonment and the payment of a \$5000 fine.

Appellant Young has been granted a stay of execution of this sentence pending the determination of this appeal.

QUESTIONS PRESENTED

1. Whether, after dismissing the conspiracy count as to appellant, the Court erred in refusing to grant his motion for a mistrial where the Government's inclusion of appellant in the conspiracy was not in good faith; where both the Court and the Government were put on notice before the commencement of the

trial that the conspiracy charge as against appellant was specious; and where the bulk of extraneous and prejudicial material that was admitted at the trial as a result of the conspiracy charge rendered it impossible for appellant to receive a fair trial.

2. Whether, apart from the misjoinder, the cumulative effect of the prejudicial testimony requires the reversal of the conviction and a new trial.

#### STATEMENT OF FACTS

On November 17, 1975, before the Hon. Charles L. Bricant, appellant, Albert Young, and three co-defendants (Benny Ong, Wong Wah, and Tom Hom) proceeded to trial on a 99 count indictment charging them with multiple counts of bribery in violation of Title 18 U.S.C. Sections 201 (B) and 2 and the crime of conspiracy as well. The gravamen of the indictment alleged that the defendants had conspired to bribe two Criminal Investigators of the Immigration and Naturalization Service in order to induce them not to search their respective premises for illegal aliens. It was additionally alleged that in furtherance of the objective of this conspiracy, the defendants did in fact tender money to these Investigators.

Young's pre-trial motion dismiss the conspiracy count and for a severance of the substantive counts.

In a motion dated March 10, 1975, Appellant Young (hereinafter referred to as "appellant") requested both a dismissal of the conspiracy count as against him and a

severance of his trial from that of his three co-defendants. Appellant claimed that the indictment, the tape recorded conversations, and the original complaint all demonstrated that the Government did not possess sufficient proof to sustain the conspiracy charge and further that his right to a fair trial would be impaired if forced to defend against both the conspiracy and the bribery charges at a joint trial.\*

Specifically, appellant alleged that the tape recorded conversations unequivocally showed that on several different occasions he expressly told the Investigators, Kibble and Granelli, that he did not want his co-defendants to know anything about his dealings with them. Similarly, according to appellant, these same tapes revealed that the co-defendants, Benny Ong and Wong Wah, disassociated themselves from him and continually made derogatory comments about him. Hence, appellant concluded that any agreement he might have reached with the Federal Agents was separate and apart from any transactions which the Agents had with his co-defendants.

Appellant further alleged that if the trial court decided to dismiss the conspiracy count on the aforementioned ground, the Court should then grant his motion for a severance. Appellant claimed that the attorney for his co-defendant, Ong,

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\*Appellant's motion is set forth in the Appendix.

(Daniel Markewich) had indicated that he intended to make reference to the fact that his client and Wong Wah were named as defendants in an indictment presently pending in the Supreme Court of the State of New York wherein it was alleged that they made bribery payments to Police Officers attached to the Squad of Special Prosecutor, Maurice Nadjari. According to appellant, Ong's attorney intended to demonstrate that both the Federal and State charges were inextricably intertwined since there existed a joint State and Federal conspiracy to entrap the Defendant Ong. Additionally, appellant claimed that the Investigators had engaged the Defendants Ong and Wah in conversations about narcotics which, if introduced before the jury, would seriously prejudice his own case.

In opposition to this motion, the Government claimed essentially that they did possess sufficient evidence to sustain the conspiracy charge and therefore appellant's motion for a severance should be denied.

In an order dated June 25, 1975, the Court denied appellant's motions and in so ruling relied primarily upon the Government's representations that they had sufficient evidence of appellant's participation in the conspiracy to sustain that charge.\*

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\*The Court's opinion is set forth in the Appendix.

## Introduction

The Government's case was predicated almost entirely upon the testimony of Lawrence Granelli and James Kibble, who were both Criminal Investigators with the United States Immigration and Naturalization Services. Their function was to locate and apprehend aliens who were illegally in the United States (58-59).\*

During the course of their present investigation in Chinatown, the two Investigators taped many of their meetings with the defendants who were allegedly giving them money in exchange for advance warning of any raids of their respective gambling establishments. With respect to the evidence against appellant, it is important to note that the Government's proof at trial did not differ substantially from that which existed on the tapes. The inference can thus be drawn that the Government was well aware in advance of the trial whether it had sufficient evidence to sustain the conspiracy charge as against appellant. While it is not necessary to set forth each and every meeting wherein a defendant made some payment to the two Investigators, appellant will set forth those meetings wherein it is clear that the Government's representations that sufficient evidence existed to sustain the

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\*Refers to pages of the trial transcript

conspiracy charge against appellant was not made in good faith. Additionally, it is appellant's position that if the Court had properly dismissed the conspiracy charge at the outset and had granted him a severance, the jury would not have been exposed to the highly prejudicial tales that the two Agents elicited from the Defendant Ong.

#### Trial

On October 14, 1973, Defendant Ong first informed Investigators Granelli and Brattlie that he would like to set up a meeting between gambling house bosses in Chinatown and officials from the Immigration and Naturalization Services in order to work out an arrangement for apprehending illegal aliens in the gambling houses (62). Investigator Brattlie was present only at this initial encounter and was thereafter replaced by Investigator Kibble. Accordingly, when Kibble and Granelli subsequently informed Ong that "their boss" was interested in the offer, Ong responded that he knew at least 8 gambling house bosses who would be willing to pay \$200 each week to Immigration officials in exchange for advance warning of their visits to gambling houses (65). Ong additionally asserted that he did not trust the bosses and would therefore prefer to deal only with Granelli and Kibble (65).

On November 8, 1973, Ong told the two Agents that the bosses of the gambling houses only wanted to pay \$100 per week (73). However, he represented that his house, the Catherine Street gambling house (appellant's establishment), and the 58 Broadway house would adhere to the \$200 per week offer (73).

It was on November 15, 1973, that the first exchange of money took place. Ong, who was accompanied by Defendant Wong Wah, shook Granelli's hand and said "It's a four," meaning \$400 to cover both Ong's and Wah's places (81). Ong then told the Agents that since the Catherine Street house had not given them any money, they would have to talk to Catherine Street themselves (81, Tr. Ex. 30, p. 7).\*

When on November 21, 1973, Ong handed the two Agents another \$400 to cover both his and Wah's house, Ong suggested that they hit the Catherine Street house because they had not given him any money and did not want to go along with his scheme (91-92).

On November 28, 1973, the two Agents again met with Ong and Wah and were given another \$400 to cover both their houses. Ong at this time bragged that he was a "big shot" with the Police and had been paying them off for 20 years. He also

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\*Tr.Ex. refers to the transcripts of the tape recorded conversations which the Government offered into evidence.

boasted that he knew the former Police Commissioner Murphy, had dinner with him, and on one occasion gave him airline tickets to go on vacation. Ong at this same meeting had occasion to describe appellant as an "idiot." (96 Tr.Ex. 31, pp. 5,9-11). Later that same evening, Investigator Granelli telephoned Ong to tell him that he would be going to Defendant Wah's place. Consequently, at about 10:20 p.m., Granelli and several other Investigators first went to 9 Pell Street where Ong gave them permission to enter and look for illegal aliens. The Investigators observed no gambling paraphernalia in view. They then went to Wah's house at 58 East Broadway where, similarly, no gambling paraphernalia was in view (100).

At another meeting held on December 3, Ong again asked if the Catherine Street house was paying them. When the Agents said no, Ong told them that appellant owed him \$5000 at one time. When counsel for appellant objected to this line of questioning, the Government represented that this testimony concerned a discussion by Ong regarding a prior corrupt deal that he had with appellant wherein appellant gave Ong money to pay off the Police. The Government claimed further that such testimony was admissible as a prior similar act and was further relevant on the defendants' predisposition to commit

such crimes (103). The Court ruled that such testimony would be excluded as to the Defendant Wah, but would be accepted as against Defendant Ong to show his predisposition to commit crimes of this nature and as against appellant to establish his relationship to Ong.

Agent Granelli was then permitted to testify that Ong had told him that some time ago appellant had missed a payment to a Police Inspector from the First Division. He further explained that the \$5000 represented six months of payoffs to the Police. At this same meeting, Ong also told the Agents about a \$12,000 robbery at some gambling house but maintained that such a sum was not much for a gambling house. When Ong was asked how he could report an illegal gambling house robbery to the Police, Ong responded that they would tell the Police that they were only playing mahjong (114). Granelli then recounted the story of appellant owing Ong the \$5000 (143, 149). Finally, at this meeting, Ong told the Agents that although Wah, appellant's partner, had wanted to talk about the present deal, appellant would not talk (Tr.Ex. 33, p. 6)

At another meeting on December 12th, Ong continued to ask the Agents whether the Catherine Street establishment was paying them. When the Agents responded negatively, Defendant Wah informed them that he did not talk to appellant (122).

On this same date, Granelli and Kibble wanted to conduct an investigation for illegal aliens who were usually Chinese crew men (131-132). However, they were denied permission to enter the Catherine Street house and search for aliens (134). Shortly thereafter, the two Agents again passed the Catherine Street entrance when appellant motioned for them to come over (135). Appellant told him that he wanted the same deal as Benny and would pay the same as him (136). Appellant also told them not to say anything about this to Benny. At the close of this encounter, appellant informed the Agents that if they wanted to go into his gambling house, they would have to give him advance notice (136-137).

The two Agents then met appellant the next day at the Jade Chalet where appellant handed Kibble \$200 under the table. Appellant insisted several times during this meeting that Ong should not know of their arrangement (140, Tr.Ex. 36, pp. 14, 16).

On December 19th, Granelli and Kibble received another \$400 from Defendants Ong and Wah. Ong said that he had heard that Catherine Street was now paying them and wanted to know how much. The Agents told Ong that appellant had insisted that they say nothing to him of their meeting,

and that he wanted the same deal (Tr. Ex. 37, p.4). Both Wah and Ong responded that they never told appellant about the deal as they did not talk (Tr. Ex. 37, p. 5). When the Agents reported to Ong that appellant was paying them \$200 a week, Ong claimed that appellant was charging the gambling house \$440 each week and was thus making \$240 per week for himself. At that point, Ong and Wah encouraged the Agents to tell appellant that they wanted double the amount. Ong additionally warned them not to let appellant fall behind in his payments and over objection repeated the story of appellant's debt of \$5000 to the Police Inspector (143).

On December 26th, Ong told the Agents how both he and appellant disliked each other and would not help each other out (Tr. Ex. 39, p. 11). Kibble also labeled appellant as "stupid." (Tr. Ex. 39, p. 14) For a fourth time, the \$5000 was discussed that appellant owed the Police Inspector (Tr. Ex. 39, pp. 11-12). Finally, Ong continued to boast about his relationship with Commissioners Murphy and Codd (147, Tr. Ex. 39, pp. 17-20).

On the next day appellant made another payment of \$200 to the Agents and was told of Ong's story concerning the \$5000

payoff the the Police. Young responded "I don't like people who talk with big mouth like that." (149) Appellant again requested that the Agents not tell Benny anything about it and that he would take care of them (Tr. Ex. 40, p. 13).

It was on January 17, 1974 that the Defendant Tom Hom entered the scene. He had initially approached the two Agents on the street and asked how much they wanted (168). The Agents thereafter expressed their annoyance to Ong and stated that such an approach could have gotten them in trouble. Ong acknowledged that it was a stupid thing to do, but asked if the man could have the same deal. Later that same evening, Ong introduced the Agents to the Defendant Hom, who apologized for approaching them on the street and stated that he wanted the same deal (169-170).

On January 23rd, Ong handed \$200 to Kibble and Granelli and told them that Defendants Wah and Hom would arrive shortly. Before Ong left, a discussion ensued about the two pounds of "white stuff" that was found in Frankie's barber shop which was worth \$20,000. Ong at this time ventured the opinion that Frankie was stupid to leave it there (Tr. Ex. 42, pp. 2-4). As Ong was leaving, Defendant Hom arrived and

handed Agent Kibble \$200. After Hom left, Defendant Wah arrived to make his payments. Wah again told the agents that he did not like appellant and did not talk to him (Tr. Ex. 42, p. 4).

On both February 6th and 7th, Granelli and Kibble engaged Ong in a conversation concerning narcotics. On the 6th, Ong told them about Lee Louis as a person they should catch as he had a lot of that "white stuff," (Tr. Ex. 46, pp. 5-7) and on the 7th, Granelli asked Ong if Frankie Wong could be trusted to sell them a kilo (Tr. Ex. 47, pp. 1-2).

On February 27, 1974, Ong and Hom each paid the Agents \$200. Ong then told the Agents about a new mahjong parlor that had just opened where many illegal aliens could be found. Ong suggested that they arrest these illegal aliens and then contact him. He would tell them that instead of paying \$300 for bail money and a lawyer, they could pay \$200 to Granelli and Kibble. At this point, appellant moved both to strike this testimony as not being in furtherance of the conspiracy and for a mistrial. The Court denied the motion for a mistrial but reserved decision on the motion to strike (196-197).

Thereafter, on March 6, 1974, Ong told Granelli and Kibble that several Police Officers had been arrested in Brooklyn

and accused him of giving them money. Ong stated that he was not worried as they had no proof. When Granelli asked Ong why he took the chance of approaching them, Ong replied that he could look at someone's face to determine if they were straight or not (199).

At another meeting on March 13th, Ong at this time referred to a Police Officer named Bill Miller, and stated that every time he talked with Miller he would search him because Miller kept a recorder. Ong maintained that if he gave Miller any money, Miller would put it in the property clerk's office and would have him arrested.

On March 20th, Ong again ~~told~~ the two agents about the \$5000 and additionally stated that appellant was no good, "He cheats everyone." (Tr. Ex. 52, p. 13)

A week later on March 27th, Granelli and Kibble met with Ong and Hom and were given \$600. Ong continued to boast that he had taken care of a Police Lieutenant for a long time. He also asserted that he knew the former Chief of Detectives, Albert Seidman, and had furnished him with Oriental women and liquor (210).

It was on April 7th that Ong told the two Agents that he had been arrested by the Police from Nadjari's office. At

this juncture, the Court denied appellant's motion for a mistrial but instructed the jury that they were not to speculate as to what Ong had been arrested for (211). When Granelli asked whether he had been taking care of the Police, Ong responded that he had been but "these are special - these are from Nadjari." (213) Ong then told the Agents that the Police were looking for Defendant Wah, but Wah had run away. Immediately, Defendant Wah moved for a mistrial and to strike said testimony. The Court denied the motion for a mistrial, but ordered the testimony stricken (212-213).

Finally, on June 12th, Ong told the Agents that Nadjari had asked him continually whether the 5th Precinct runs everything (229).

At the conclusion of the Government's case, appellant again moved for a dismissal of the conspiracy count as against him (867). The Court in dismissing the conspiracy count, stated:

"I am prepared to find that no reasonable juror, acting reasonably, could infer, on the basis of the evidence presently before me, that Young joined this conspiracy, had a stake in its outcome or made it something that he wished to succeed. The most they would find that he knew about it, that he was unfriendly with the people in it, that he desired the same terms directly with the agents; in fact he told the agents that he wanted to bribe them on the same terms as the conspirators were bribing them, but that the agents shouldn't tell the conspirators." (875-876)

In regard to the severance, the Court ruled as follows:

I think I ought to say a word or two about the severance aspect of the June 25th memorandum decision. I think the Court was still on proper ground even with regard to what has happened since on the subject of the proper joinder. I'm relying in part on United States v. Catino, 403 F.2d 491, and Stern v. United States, 409 F.2d 819, both Second Circuit cases, and indeed there are others.

I would say that if Young had been brought before me as a defendant in a separate trial, because of his statements on the tapes it would still be necessary and permissible for the Government to prove the existence of the conspiracy between Ong and others, the objects of that conspiracy, and the means adopted to carry out the unlawful objects of that conspiracy, because we have Young saying on the record that he has knowledge of the transactions between the undercover agents and Ong, and accordingly, he has full knowledge of all of the means and purposes of that conspiracy and intends and wishes that the agents gave him the same treatment at the same price as they are giving to the actual co-conspirators.

As far as the statement that there were eight gambling houses which had authorized Ong to act for them in this matter, that, on the evidence in this case, is not proof and has to be regarded as either puffing on Ong's part or an expression in the nature of a prediction that he would be able to obtain the assent to the conspiracy and obtain the membership in the conspiracy of these other five houses which included Young's house.

I will add to that the fact that on several occasions after the inception of the conspiracy Ong is found on the tapes inciting the agents to raid the house at Catherine Street so as to induce Young to join the conspiracy and pay his obligations thereto, which apparently he had not yet done.

So I will grant the motion as to Count 1 only as to Young.

Appellant was thereafter found guilty of the substantive charges of bribery.

On January 13, 1976, appellant moved to set aside the verdict on the ground that the Court, after dismissing the conspiracy charge, erred in refusing to grant a mistrial, especially when the Government's inclusion of him in the conspiracy was not in good faith. In denying appellant's motion, the Court first made a finding that the Government joined the defendants in this single conspiracy in good faith as they possessed reasonable grounds to prove appellant's participation in the conspiracy (min. of 1/16/76). The Court also found that much of the evidence produced on the conspiracy count could nevertheless have been heard by the jury, even had appellant been granted a separate trial (id. at p. 18).\*

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\*The Court's decision is set forth in the Appendix.

## ARCUMENT

### POINT I

AFTER DISMISSING THE CONSPIRACY COUNT ONLY AS TO APPELLANT, THE COURT ERRED IN REFUSING TO GRANT HIS MOTION FOR A MISTRIAL WHERE THE GOVERNMENT'S INCLUSION OF APPELLANT IN THE CONSPIRACY WAS NOT IN GOOD FAITH; WHERE BOTH THE COURT AND THE GOVERNMENT WERE PUT ON NOTICE BEFORE THE COMMENCEMENT OF THE TRIAL THAT THE CONSPIRACY CHARGE AS AGAINST YOUNG WAS SPECIOUS; AND WHERE THE BULK OF EXTRANEOUS AND PREJUDICIAL MATERIAL THAT WAS ADMITTED AT THE TRIAL AS A RESULT OF THE CONSPIRACY CHARGE RENDERED IT IMPOSSIBLE FOR APPELLANT TO RECEIVE A FAIR TRIAL ON THE SUBSTANTIVE CHARGES.

Well over six months before the commencement of the trial, Appellant Young made a two-fold motion requesting the dismissal of the conspiracy count against him and a severance of his case from that of his three co-defendants. Counsel attempted to alert the Court to the fact that the conspiracy charge as a matter of law could not be sustained against his client at trial. The Government, on the other hand, asserted that the tapes of the recorded conversations unequivocally established that appellant played an active role in the conspiracy. Based solely upon the Government's representations as to what their evidence would be at the forthcoming trial, the Court denied Young's motions.

While prior to the trial, the Court acted within its discretion in denying the motion for a severance (United States v. Dineen, 463 1036 (10th Cir. 1972); De Luna v. United States, 308 F.2d 140 (5th Cir. 1962); United States v. Jenkins, 496 F.2d 52 (2d Cir., 1974); United States v. Turcotte, 515 F.2d 145 (2d Cir. 1972); nevertheless, at the close of the Government's case and upon dismissing the conspiracy charge as to the appellant Young alone, the Court erred in refusing to grant his motion for both a mistrial and a severance.

The test as to whether such relief should be granted was succinctly set forth by this Court in United States v. Aiken, 373 F.2d 294, 299 (2d Cir. 1967) wherein it stated:

Where joinder was originally proper under Fed.R.Crim.P. 8(b) . . . a motion for severance after the count justifying joinder (here the conspiracy count) is dismissed will not be granted unless the defendant was prejudiced by the joinder or the count dismissed was not alleged by the Government in good faith, that is, with reasonable expectation that sufficient proof will be forthcoming at trial.

See also Schaeffer v. United States, 362 U.S. 511 (1960); United States v. Kaufman, 311 F.2d 695 (2d Cir. 1963); United States v. Elgisser, 334 F.2d 103 (2d Cir. 1964); United States v. Branker, 395 F.2d 881 (2d Cir. 1968). An examination of the present record establishes without any doubt that appellant Young has more than satisfied the tests set forth in Aiken, supra, to warrant a new trial.

First, given the existence of the tapes, there is no way that the Government could have entertained any "reasonable expectation" that sufficient proof existed as to appellant Young's participation in the conspiracy. In fact, the tapes clearly negated any inference that Young was a member of the Ong conspiracy:

1. The tapes of 11/15/73 consist of Ong informing the Agents that Young had refused to go along with his plan.
2. The tapes of 11/21/73 consist of Ong telling the Agents that Catherine Street (Young's place) would not go along with the plan.
3. The tapes of 12/3/73 reveal Ong's antagonism towards Young when he tells the Agents that Young is a nut, that he is no good because he doesn't talk, and that the Agents should keep hitting the Catherine Street place. Ong additionally told the Agents that although Wah, appellant's partner, had wanted to talk about the present deal, appellant refused.
4. The tapes of 12/3/73 and 12/14/73 show that Young wished to keep any arrangements which he had made with the Agents a secret from Ong.
5. The tapes of 12/19/73 continue to bolster the conclusion that Young was not part of any conspiracy. In these tapes, Ong once again tells the Agents that Young is no good and that nobody likes him. Further, Ong tells the Agents that Young wants to kick Wong out of business. Even more important, both Wah and Ong represented to the Agents that they never told appellant about the deal as they didn't talk to him.

6. The tapes of 12/26/73 further reveal Ong's hostility towards Young when he tells the Agents that Young is not a friend, that he is stupid, and that they don't help each other.

7. The tapes of 12/27/73 reveal further discussion between Young and Ong and Young at this time in no uncertain terms tells the Agents "Don't tell Benny nothing. I take care of you."

8. The tapes of 1/23/74 reveal that even Wong Wah had disassociated himself from Young when he told the Agents that he did not talk to Young and did not like him.

9. Finally, the tapes of 3/20/74 continue to establish appellant's disassociation with any conspiracy involving Ong. At this time, Ong tells the Agents that appellant is no good. "He cheats everyone."

Hence, the sum total of these remarks cannot support a finding that the Government could entertain any "reasonable expectation" that they could succeed in proving that appellant Young was part and parcel of the conspiracy. On the contrary, the only evidence supplied by the Government was that the defendants knew one another and were engaged in similar businesses. Such proof falls far short of establishing Young's participation in any conspiracy.

What is so particularly egregious regarding the Government's representations to the Court prior to trial is that they

were well aware in advance of the trial of all the evidence they had as against appellant Young. Their case was predicated almost entirely upon the Agent's verbatim recital of his taped conversations with the various defendants. Since there were no deviations from this line of evidence, no claim of surprise can be raised by the Government, they cannot claim that they had any expectation that more favorable evidence linking Young to the conspiracy would be elicited from any of their witnesses; and they certainly cannot claim that the Court failed to admit in evidence any proof bearing on Young's involvement in the conspiracy.

Considering all of these facts, the only logical conclusion that can be reached is that either the Government's understanding of the law of conspiracy was sorely lacking (United States v. Borelli, 336 F.2d 376 (2d Cir. 1964)), or that their charging of Young with the conspiracy was merely a device to permit the convenience of a single trial. In this regard, it must be noted that prior to the trial, the Court properly could have relied upon the Government's vigorous but misleading representations that their evidence would demonstrate a single conspiracy involving the Appellant Young. However, after the Government had rested its case, it is difficult to understand the Court's conclusion that the Government had acted "in good

faith" in initially joining appellant in the conspiracy. The entire record defies such a finding. To support its determination of "good faith" on the part of the Government, the Court took a few statements out of context. The Court relied totally on Ong's initial statements to the Agents that his house, the Catherine Street gambling house (appellant's establishment) and the 58 East Broadway house, would pay the \$200 per week and the fact that Wah had been associated with appellant. If this were the extent of the taped conversations, then perhaps the Court would have been correct in assuming that the Government acted in good faith. Unfortunately, though, for the Government, every single taped conversation on the subject occurring subsequent to the first few tapes thoroughly demolishes any argument that the Government acted in good faith. Under no circumstances do the tapes, considered as a whole, justify the Government's joining of appellant in the single conspiracy.

Second, but equally as important, the instant record abounds with instances of highly prejudicial and inflammatory evidence that could not have been admitted against Appellant Young alone, had it not been for the conspiracy charge.

As a result of the conspiracy charge, a mass of extraneous material which bore no relationship to the bribery charges against Young was elicited on Agent Granelli's direct testimony. Notwithstanding that the bulk of the hearsay testimony encompassing Ong's, Wong's, and Hok's conversations with the Agents would not have been admissible against Young had he been tried on the bribery charges alone, under no circumstances would any court have allowed the following evidence to be introduced before a jury at a single trial:

Ong's representations that he had been paying off the New York City Police Officers for 20 years and that he was a big shot down there; Ong's boast that he knew the former Police Commissioner Murphy, had dinner with him on one occasion, and in addition gave the ex-Commissioner airline tickets to go on a vacation (95-96); Ong likewise boasted that he knew Police Commissioner Codd (147, 185); he also attempted to impress Agent Granelli with the fact that he was acquainted with the former Chief of Detectives, Albert Seidman and how he furnished Seidman with Oriental women and liquor (210); Ong's tale regarding the money owed to him by Young for paying off a Police Inspector from the First Division; and finally, Ong's discussion concerning the \$12,000 robbery at some gambling house and his allegation that such a sum was not much for a gambling house (106, 111, 113).

However, even more devastating than Ong's tales of corruption in Chinatown were his conversations concerning the illegal narcotic activities there. Conversations were

admitted into evidence, via the tape recordings, showing the participation of a number of people in various illegal narcotic activities. These activities bore absolutely no relationship to Appellant Young, were not relevant to the charges of bribery, and were admitted only because of the overall conspiracy charge. Equally as damaging was Ong's arrest by New York's Special Prosecutor, Maurice Nadjari, for bribing other Police Officers.

In denying counsel's motion for a mistrial and a severance, the Court appeared to be of the opinion that this bulk of hearsay and prejudicial evidence could have been admitted at a single trial as background material. Even assuming that the Court is correct that some background material could be introduced at a severed trial, nevertheless, it is extremely doubtful that any of the aforementioned evidence would have been permitted under any existing legal theory had Young received a separate trial. The present trial was simply saturated with Ong's vivid tales of corruption which had nothing whatever to do with appellant. To introduce such evidence at a separate trial would doom the Government's case to reversible error. While the Government has been permitted great leeway in presenting its case, the aforementioned evidence surely transcends the bounds of propriety.

Moreover, the Court in denying appellant's motion for a severance relied primarily upon this Court's decisions in United States v. Catino, 403 F.2d 491 (2d Cir. 1968) and Stern v. United States 409 F.2d 818 (2d Cir. 1964). The Court's reliance was misplaced. In both these cases there was absolutely no showing of prejudice other than the standard hearsay statements regarding the objectives of the conspiracy. In fact, because of the admitted absence of prejudice, the defendant in Catino asked this Court to grant the severance ipso facto without a showing of prejudice. In direct contrast to Catino, we have demonstrated that appellant was exposed to an overwhelming amount of prejudicial evidence that had to "spill over" to his case.

In answer to this argument, the Government cannot rely on the Court's curative instructions as obviating any potential for prejudice. Even the strongest instructions from this Court could not have erased this damaging information from the jurors' minds when deliberating upon the question of Young's culpability. The Courts have aptly recognized that jurors once exposed to prejudicial evidence cannot realistically be expected to follow instructions to disregard such evidence. Bruton v. United States, 391 U.S. 123 (1967); Jackson v. Denno, 378 U.S. 368 (1964); United States v. Bozza, 365 F.2d 206 (2d Cir. 1966). And that is precisely

the case here. After hearing such detailed evidence regarding the payoffs to New York City Police and the narcotic activities in Chinatown, the jury simply had to consider such evidence as against Young, despite the Court's instructions to the contrary.

Moreover, although the Court's instructions were correct as a matter of law, it should also be noted that a good portion of its instructions were devoted to explaining the law of conspiracy (1130-1151). Thereafter, pursuant to the jury's request, the Court again recharged the jury on the law pertaining to the conspiracy charge (1182-87). Hence, the emphasis in this trial was indeed focused on the conspiracy issue and not on the substantive charges of bribery - all to Young's disadvantage. Under such circumstances, the risk of prejudice to Appellant Young by reason of the joinder was so great that "no amount of cautionary instructions could have undone the harm." United States v. Branker, *supra* at p. 896; United States v. Kelly, 349 F.2d 720 (2d Cir. 1965), cert. den. 384 U.S. 947 (1966).

The Government must be held to the standards set forth in United States v. Branker, *supra*:

If the prejudice of joint trial is to be eliminated without the waste of time and energy which results from a joinder which is declared improper in the midst of the trial, or, as here, on appeal, we must rely on the responsibility and good judgment of the prosecutors. Supra at p. 899

Since the Government in this case did not exercise good and responsible judgment regarding the conspiracy count as to the Appellant Young, and since Appellant Young was seriously prejudiced by the misjoinder in this case, this Court should find that he was entitled to both a mistrial and a severance.

#### POINT II

APART FROM THE MISJOINDER, THE CUMULATIVE EFFECT OF THE PREJUDICIAL AND INFLAMMATORY TESTIMONY REQUIRES THE REVERSAL OF APPELLANT'S CONVICTION AND A NEW TRIAL.

In Point I of this brief, we have established that after the dismissal of the conspiracy count, the Court should have granted a motion for a severance under Rule 14 on the ground of prejudicial misjoinder. Irrespective of the issue of misjoinder, it is submitted that the voluminous amount of prejudicial and inflammatory testimony that was elicited by the Government rendered it impossible for Appellant to receive a fair trial.

At the outset, it cannot be overlooked that appellant and his co-defendants were only charged with multiple counts of

bribery and conspiracy to commit this crime. Despite the seemingly simplistic nature of these charges, the Government was of the opinion that it had to pad its case with irrelevant, but damaging, testimony involving the inherent corruptness of Defendant Ong.

The impact of Ong's vivid tales of improbity upon the jury could not have been more dramatic. Certainly, Ong's stories, as told by Investigator Granelli, had to convince the jurors that all of the defendants were equally as corrupt as Ong and were thus predisposed to commit the crimes charged.

While Ong bragged about paying off the police for the last 20 years, he felt compelled to demonstrate that he did not act alone in such an illegal endeavor, but that appellant was also a participant. Hence, the jury was repeatedly confronted with Ong's monologue concerning appellant's payoff of \$5,000 to a Police Inspector. The Court admitted this evidence as against appellant to show only his relationship to Ong and so instructed the jury. By such instruction, the Court was in effect permitting the Government to establish appellant's guilt through his reputed association with Ong. To prove a defendant's guilt by his alleged association with any one person is clearly repugnant to any concept of Due Process. United States v.

Kompinski, 373 F.2d 429 (2d Cir. 1967); United States v. Fantuzzi, 463 F.2d 683 (2d Cir. 1972); United States v. Ragland, 375 F.2d 471 (2d Cir. 1967); United States v. DeCicco, 435 F.2d 476 (2d Cir. 1970). But even more devastating, the Government in its summation used this unfounded allegation to bolster its case against appellant. Over objection, the Government stated:

"He (Ong) talked facts, figures and dates. He told you about the \$5,000 he had laid out for Albert Young for Police Inspector . . . He told you about this \$5,000. He told you about it on three different occasions, not three different stories, just three different times he told the story.

He told you it was two years ago that it was to protect gambling and vice from 14th Street to Mulberry Street, and he told you how he made Young pay him back \$500 a week for ten weeks.

You listened to it. You decided if there was not a ring of truth to many of Mr. Ong's statements"(955-956).

The Government then went on to state:

"Incidentally, what was Albert Young's reaction to this story about the \$5,000. He was confronted with it. Yes, it is true that at one point late in the conversation he gave a hollow denial. But his first reaction when they caught him unaware was that he didn't want to say anything about it"(958-969).

Such outrageous statements by the Government should not receive judicial sanction. The Government in attempting to impress upon the jury the fact that appellant made this \$5000 payoff

completely vitiated the Court's instruction that this testimony was not to be admitted for the truth of its content as against appellant. Moreover, the Government told the jury that appellant's failure to refute such a story established its veracity. Certainly, appellant had no obligation whatever to either deny or affirm Ong's spurious tale. What was so particularly egregious about eliciting this testimony in the first place was that appellant could not defend against such an allegation. He could not effectively cross examine Investigator Granelli concerning the truthfulness of this statement since Granelli was only repeating Ong's story. And Ong did not take the stand and subject himself to appellant's cross examination. Under these circumstances, the jury would improperly infer that because appellant had made these prior payoffs to the Police, he must also have made the payoffs to the two Investigators in this case.

The prejudice to appellant was further exacerbated when the Government elicited additional testimony which showed Ong's eagerness to extort money from illegal aliens. Ong suggested that the Agents arrest the aliens and then contact him. He in turn would tell them that instead of paying \$300 for bail money and a lawyer, they could pay \$200 to Granelli and Kibble. Since this scheme had nothing to do with the

other three defendants in this case, it had no place in this trial and at the very least the Court should have granted appellant's request to strike this testimony from the record.

Throughout this trial, the Government continued to paint a vivid picture of Ong's unscrupulousness. The jury was privy to Ong's persistent boast that he was a "big shot" with Commissioners Murphy and Codd; that he did not trust another Police Officer named Bill Miller who would immediately place him under arrest for bribery; and that he had furnished the former Chief of Detectives, Albert Seidman, with Oriental women and liquor. The most damning evidence, however, was the Government's elicitation of testimony concerning narcotics. This evidence made it virtually impossible for appellant to receive a fair trial. Indeed, this evidence had to convince the jury that the defendants must have been engaged in a wide range of well paying illegal enterprises which did not exclude trafficking in drugs. In this straight bribery case, no valid reason existed on the face of this record to inject the issue of narcotics into this case. The receipt of this evidence stretched the rules of relevancy to their bursting point when considered against its awesome prejudicial impact. In this regard, the Government cannot argue that such evidence was

elicited inadvertently. Such an argument is irrelevant for the hard fact remains that the jury heard this prejudicial evidence and thus had to take it into consideration when deliberating upon the critical question of guilt or innocence. Furthermore, Defendant Wah's counsel made a motion to strike from evidence those tape transcripts which made reference to the drugs. The Court, however, summarily denied this motion. Hence the question of the defendants' involvement in this heinous world of drugs was squarely placed before the jury - all to appellant's detriment.

The final blow to the defense was inflicted when the Government sought to establish the fact of Ong's arrest by Special Prosecutor Nadjari. The Court's instruction to the jury that they were not to speculate as to what Ong had been arrested for was an exercise in futility. Because of the detailed evidence of Ong's payoffs to the Police that already had been elicited, the jury could quite readily have assumed that he had again been arrested for bribery.

It is submitted that if the Government is to be permitted the convenience of this single trial, it should not be allowed to saturate its case with such highly prejudicial and inflammatory evidence under the guise that it is admissible against one of the defendants. Because appellant was forced

to proceed to trial with his three co-defendants, he should also not be forced to endure the prejudicial effects of evidence that has no bearing on his own case. If the Government is of the opinion that such evidence is necessary to insure the conviction of one of the defendants, the Government should then consent to a severance. But under no circumstances should the Government be allowed to use the device of a single trial to justify the admission of this harmful testimony which necessarily had to "spill over" to the other defendants and firmly secure convictions.

Since appellant could not receive a fair trial in an atmosphere rampant with prejudicial influences, his conviction must now be reversed and a new trial ordered.

### POINT III

PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE, RULE 28(i), ALL RELEVANT ARGUMENTS RAISED IN THE BRIEFS FOR THE CO-DEFENDANTS ARE INCORPORATED BY REFERENCE.

### CONCLUSION

FOR THE ABOVE STATED REASONS, APPELLANT YOUNG'S CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

April, 1976

JULIA P. HEIT  
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RESPECTFULLY SUBMITTED,


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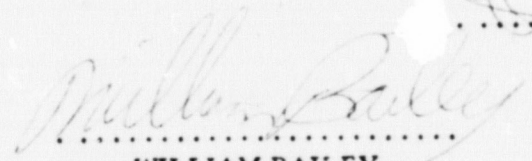
AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,  
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 7 day of April, 1976 at No. 1 St. Andrews PL. NYC deponent served the within Brief upon U.S. Atty. So. Dist. of NY the Appellee herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,  
this 7 day of April 1976

  
.....  
Edward Bailey

  
.....  
WILLIAM BAILEY  
Notary Public, State of New York  
No. 43-0132945  
Qualified in Richmond County  
Commission Expires March 30, 1978 1977